SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE,

Petitioner,

vs.

THE STATE OF TEXAS.

WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF OF THE PETITIONER ON PETITION FOR REHEARING BY THE STATE OF TEXAS.

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BRIEF OF PETITIONER IN OPPOSITION TO PETITION OF THE RESPONDENT FOR REHEARING ON CERTIORARI GRANTED PETITIONER AND REVERSING OF JUDGMENT OF COURT OF CRIMINAL APPEALS OF STATE OF TEXAS.

To the Honorable the Supreme Court of the United States:

Your Petitioner, Bob White, shows in opposition to the granting of the petition for rehearing on behalf of the Respondent, State of Texas, the following:

A.

Summary Statement of the Matter Involved.

1. PRESENT STATUS OF THE CASE.

This Honorable Court on the 25th day of March, 1940, entered in this cause, the following order, to wit:

"Per Curiam: The motion for leave to file a petition for rehearing is granted, and the petition for rehearing is granted.

> The order entered November 13, 1939, is vacated. The motion for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted and the judgment is reversed. Chambers *v.* Florida, No. 195, decided February 12, 1940; Canty *v.* Alabama, No. 634, decided March 11, 1940.
>
> The mandate is ordered to issue forthwith."

On the "Order Allowing Certiorari" on the same date, this Court stated:

> "The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted.
>
> And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ." (Fol. 89) (R. 163).

In due course, the State of Texas, filed in this Court its Petition for Rehearing, and by order of this Court entered on April 22, 1940, set this cause to be heard on this petition for May 20, 1940, on the State's contentions upon the questions set forth in subdivisions (e), (f), (g), (h) and (j) of paragraph 4. (Respondent's petition pp. 6-8).

The record in this cause and now before this Court reflects that in the court below, Bob White, Petitioner herein, was last convicted of the capital offense of rape by assault and his punishment fixed at death, in the District Court of Montgomery, Texas, on August 5, 1938 (R. 16-17). This judgment was appealed to the Court of Criminal Appeals of the State of Texas, being the highest court in criminal cases where an opinion can be had, and was in all things duly affirmed, on March 22, 1939, by this Court of Criminal Appeals. The judgment of which court became final on May 17, 1939, when the motion for rehearing was overruled. (R. 132-143.)

The petitioner on June 6, 1939, filed his application for a writ of certiorari to the Court of Criminal Appeals of

Texas in this Court, and was by this Court denied on November 13, 1939, which order was, on motion for rehearing, vacated by this Court on March 25, 1940, as heretofore shown. The Court of Criminal Appeals upon receipt of the mandate of this Court issued on March 25, 1940, and in response thereto, entered an Order, dated, April 3rd, 1940, arrested the mandate and all proceedings to enforce the judgment of the trial court and the Court of Criminal Appeals and stayed the same until further order of that court. (Respondent's petition pp. 9-10).

The petitioner Bob White is still held by the Warden of the State Penitentiary at Huntsville, Texas, under the death sentence of the State courts pending further action on the petition for rehearing by this Court on the State's application.

Opinion Below.

The opinion of the Court of Criminal Appeals of the State of Texas, from which the writ of certiorari was granted is reported in Vol. 128, Southwestern Reporter, 2nd Series at page 51 *et seq.* The other opinion out of which this case grew is reported as *White* v. *State*, 117 S. W. 2d. 450.

Jurisdiction.

This Court by granting the writ of certiorari on March 25, 1940, on the Petitioner's Motion for Rehearing has determined the question of jurisdiction, and by reversing the judgment of the Court of Criminal Appeals has determined that the record reflects the same constitutional questions raised and adversely decided by the State court as were raised and adversely decided by the Supreme Court of Florida, as reported in *Chambers* v. *State*, 187 Southern Reporter p. 156, 136 Fla. 568, which case was reversed by this Court in *Chambers* v. *Florida*, No. 195, decided February 12, 1940. This Court affirmed this holding on March

11, 1940, in *Canty* v. *Alabama*, No. 634, and by granting the writ of certiorari, and reversing the judgment of the Court of Criminal Appeals of the State of Texas, in this present cause, again reaffirmed the *Chambers* v. *Florida* case and the *Canty* v. *Alabama* case.

Statement of the Case.

On or about August 10th, 1937, the State alleged that one Mrs. Ruby Cochran, a member of a prominent white family living on a farm about 12 miles from the town of Livingston, in Polk County, Texas, was raped by violence in her home, about 11 p. m., where she had retired in an upstairs bedroom. The prosecutrix testified that the attack upon her was on a Tuesday night, with no one at home with her, except her two little boys, who at that time were sleeping on cots on the sleeping porch (R. 73). That at that time her husband, called "Dude" Cochran, was absent. She was unable to identify the petitioner as her assailant or any one else. She finally testified that the party who raped her on the night of August 10th, was undoubtedly a Negro" (R. 78).

There is no testimony in the record to show who gave the alarm after the alleged rape; there is nothing in regard thereto in Mrs. Cochran's testimony (R. 71-78). C. L. Cochran, brother-in-law of the prosecutrix testified that at the time of the alleged assault he was in Livingston, Texas, which is about twelve miles from the home of prosecutrix. That he heard of the "assault" around ten o'clock on the night of August 10, 1937, that his brother Ernest, also there in Livingston "phoned" him the news. That he "phoned Mr. Carlisle to go to Dude's house as quickly as he could, and that he notified Sheriff Holliday and one Mr. Kimble, and that when he and his brother arrived at his brother's home, Mr. Carlisle was there, and sheriff arrived just a little ahead of him. That he was present when a search

was made of the entire house for evidence, and that all of them went through the house together (R. 67-69). Later the Sheriff of Walker County, arrived on the scene where the alleged assault took place with blood hounds from the State penitentiary at Huntsville, Texas, although there were bare foot tracks around the Cochran house, the dogs were not allowed to track. A finger print expert arrived from Lufkin to make an examination of the premises (R. 56).

The next day, Wednesday, August 11, 1937, between the hours of 9 and 10 a. m., Bob White, Petitioner, while working in a field near his home; was taken into custody by Ernest Cochran, the brother-in-law of the prosecutrix. Bob, at that time, lived with his mother on a farm approximately two miles from the Cochran home, in a house about 300 feet from a dirt road (R. 71-72 & R. 89). Sheriff Holliday testified that he carried Bob White to Ernest Cochran's home in Livingston, where with fifteen or sixteen other Negroes, previously arrested, were carried before the prosecutrix, questioned and later placed in Jail (R. 52-54). He further testified that although he held Bob White and about 15 or 16 others and charged all of them with the same offense, he did not file a complaint against any of them, but he held them for observation (R. 58). These Negroes together with Bob White were held in the Livingston jail several days (R. 54). Later around about August 18, 1937, Bob White was removed to the Beaumont jail by Sheriff Holliday (R. 54) when the alleged confession was obtained (R. 33).

On the day Bob White was arrested, two Texas Rangers, M. W. Williamson and E. M. Davenport were sent from Houston, Texas, to Polk County by Captain Purvis of the Rangers to aid the sheriff and others in the investigation of the alleged assault upon Mrs. Cochran. Also Coleman Weeks, a peace officer from Livingston, Texas, worked with

these Rangers in the case (R. 124-128). These are the three officers which Bob White identified as being ones who tortured him in the woods in the attempt to make him confess the crime (R. 88-93).

Bob White, to the indictment charging him with rape by violence on the prosecutrix (R. 1-2) on or about the 10th day of August, 1937, pleaded "Not guilty" (R. 13), and at the trial thereon before the Hon. Judge Browder, denied the assault and asserted that at the time of the alleged assault he was at home sleeping and further that due to the fact that he was suffering from a disease at that time, which made him unable to have sexual intercourse with any one (R. 88-89). He testified in substance that after his arrest about 9 o'clock on the morning August 11, 1937, which was Wednesday, he never was turned loose again. He stated that he was carried to Dude's Cochran home where the alleged attack took place, and from there he was taken to the court house in Livingston where he was finger printed, and from there he was taken to Livingston jail, where he remained seven or eight days. He stated that while he was being held in the Livingston jail, beginning that Thursday night, he was taken out handcuffed by Texas Rangers and carried into "the woods somewhere" where he was whipped by these officers with what he supposed to be a rubber hose (R. 89). He stated that he was carried out in the woods again by these officers "several nights in a row, and each time he was hand-cuffed, and each time they whipped him, and each time they told him that he had better not tell that they had him in the woods, and to say, that they had him at the court-house talking to him (R. 90). The third night he was taken out, he was hand-cuffed and locked to a tree, and after getting out of his pants, upon the command of the officers, they whipped him, and that time he was asked about a confession they desired him to make. "Well, he asked me, he says you ain't going to say

you did it and I told him no, sir. He said then you are going to say you did it when we git through wid you. I told him I was not going to say I done it" (R. 90).

Bob White in testifying to the statement introduced by the State at the trial before Judge Browder, stated that Mr. Coker (County Attorney of Polk County at that time) made that statement, as he could neither read nor write, nor understand what he put in that statement (Note. Reference is here made to the alleged confession of Bob White, marked as Exhibit 1, appearing in Record on pages 35 to 41). He testified further in substance that Rangers M. W. Williamson, and E. M. Davenport, and Coleman Weeks, whom he later identified in court (R. 92-93) as being same officers who had taken him from the Livingston jail at night into the woods and whipped him, and the other nights during the time he was in the jail. That Sheriff Holliday took him to Beaumont after the Rangers got through whipping him, on a Saturday night and held him over until Sunday morning while they made that "statement"; and during that time in Beaumont jail, he saw Rangers Williamson, Davenport and the officer Weeks and others. He denied being warned that he did not have to make a "statement" or anybody telling him that such "statement" if made would be used in the trial against him. Also denied making a voluntary statement about assaulting Mrs. Cochran. He also stated that during the time he was out in the woods with the officers some one of them struck him on his head, which affected his hearing, and that while he was being held in Beaumont at the time the "statement" was made he was kicked by a Ranger, when he dozed off to sleep (R. 88-93). Bob stated that while he was in Beaumont he was not given an opportunity to get an attorney or lawyer, that he "knowed" no lawyer, and none of his people was there (R. 91).

The trial there before Judge Browder at Conroe, Montgomery County, Texas, resulted in a verdict of guilty as charged and punishment fixed at death (R. 16-17), in due course motion for new trial was filed and overruled (R. 25) which judgment was affirmed by the Court of Criminal Appeals (R. 141) which became final on the Order denying a Rehearing (R. 141-143).

B.

Reasons Relied On for the Denial of the Respondent's Petition for Rehearing.

1.

This Court reached a correct decision in granting the leave to file the Motion for Rehearing and granting the Motion for Rehearing, vacating the Order of November 13, 1939 entered by this Court, granting the Writ of Certiorari and reversing the judgment of the Court of Criminal Appeals of Texas:

a.

The citation of *Chambers* v. *Florida*, No. 195, decided by this Court on February 12, 1939, and *Canty* v. *Alabama*, No. 634, decided March 11, 1940, as authority for the granting of the writ and reversing the judgment of the lower courts, is fully sustained by the record in this cause.

(1) The State's evidence concededly shows compulsion was used in obtaining the alleged confession.

The Criminal Appeals' Court of Texas in overruling the Bill of Exception No. 3 (R. 29-32) of Bob White which complained of the introduction of an alleged confession in evidence, because the same was extorted from him by means of whipping, violence done to him, and under duress and threats, rendering the same involuntary, as set forth in the thirteen paragraphs in the said bill, approved the submission of the burden of the appellant's objections to the

jury by the trial court, and also its refusal to sustain the objections of the petitioner Bob White, to its admission in evidence and being read to the jury, as reflected by the bill (R. 29-32). This was a holding in substance and effect by the Court of Criminal Appeals that the alleged confession as presented by the State and allowed in evidence over timely objections, raised merely issues of fact respecting its involuntary nature, and was thus, within the province of the jury to decide whether the evidence beyond a reasonable doubt showed that the confession so called was obtained under duress, violence, coercion, fear or other improper influences.

In deference to the Court of Criminal Appeals an examination of the evidence presented on behalf of the State concededly show that the alleged confession was obtained in violation of the Constitutional rights of the petitioner.

i. The evidence without conflict shows that Bob White was arrested on August 11, 1937, between the hours of 9 and 10 a. m. near his home, in the field where he was working that day in Polk County, about two miles from Mrs. Ruby Cochran's home (R. 53; 89). Sheriff Holliday testified that he held Bob in jail there in Livingston six or seven days before he was taken to Beaumont, and that he did not file a charge against Bob or any of the other fifteen or sixteen Negroes he was holding for observation (R. 58). H. R. Appling testified that the first time he saw Bob White was on August 18, 1937, in Beaumont (R. 33), and Ernest Coker, County Attorney of Polk County, Texas, during that time, stated that he saw Bob White on the same date in Beaumont where he admitted typing the "statement" (R. 34).

The evidence of the State shows that Bob White was held in jail at least 7 days before he was taken to Beaumont.

ii. Coleman Weeks, a peace officer of Livingston testified that he saw Bob White during August, 1937, after he was

arrested for rape of Mrs. Ruby Cochran; and he was pointed out in court by Bob White as one of the officers who took him out of jail in Livingston and whipped and beat him (R. 93), admitted that he took him out of jail there but he did not know how many times and that he accompanied the Rangers when they took him out (R. 128).

iii. E. M. Davenport, testified that he was State Ranger and was sent to Livingston in August, by Captain Purvis, and during the six, seven or eight days he was there he had occasion to see and talk to Bob White. He refused to deny that Bob White was taken out of the jail while at Livingston and taken out on the road and taken out in the woods. "It would be hard to say. If Mr. Williamson testified to that, I could not say he was wrong" (R. 127-128).

iv. M. M. Williamson stated that he was a State Ranger, and had been one since 1935, and that he came to Polk County in August, 1937, under orders from Captain Purvis to assist the sheriff's department in the investigation of the assault on Mrs. Cochran, that he arrived on the afternoon of August 11th. He admitted testifying in the first trial of this case in Livingston, where on the witness stand under oath he stated that "I don't know exactly the number of times that I took this negro out from the jail during the time he was confined in jail, because I took him out so many times". That he further testified at Livingston that "I would take them out on the road. I would drive out off the road with them" (R. 125-126). In giving his reason for taking petitioner out of jail, he said he did so because the jail was crowded and he wanted to talk to him. "There were lots of them in there and we took them out where we would be by ourselves to talk to him" (R. 126).

v. The testimony of Sheriff Holliday directly contradicts the testimony of Ranger Williamson on the necessity

of taking Bob White out of jail there in Livingston to talk to him, as he states that during the time he held him in jail there, he had occasion to observe him for several days, that he would not eat, so "I placed him in jail to himself. I kept watching him and talking to him." That he talked with him "about an hour and a half before he carried him to Beaumont" (R. 54). On cross-examination he could not recall the Texas Rangers taking Bob White from jail. "They could have taken him from jail if they had wanted to". (R. 58).

v. As already shown the State's evidence shows that Bob White was carried to Beaumont on August 18, 1939, by Sheriff Holliday. Mr. Z. L. (Zimmie) Foreman, the private prosecutor who assisted the State in both trials, also appeared as a witness for the State at the trial in the Montgomery County District Court. He stated that he left Livingston for Beaumont around twelve o'clock that night and in company with Mr. Ernest Cochran, County Attorney of Livingston County, and arrived there somewhere around two o'clock that night. That they found Bob White upstairs in the Beaumont jail with Mr. R. D. Holliday (sheriff), Roy Young, and Ranger Jameson, Mr. Appling and Mr. Crocker, and others. That he was sure Rangers Williamson and Davenport, were in and out of the room while Bob White was there. This witness stated that he was sure that the Rangers, Mr. Ernest Coker, and Mr. Holliday knew that they came there for the purpose of getting the statement from Bob White. This witness did not deny that it took from two o'clock in the morning until daylight to get the statement. That they fooled around there, waiting to go up and get somebody down there that was not involved in it and that knew nothing about it to witness the statement (R. 115-121). Herman Crocker, the person whose name appears on the statement as a witness, stated that he saw Bob White in the Beaumont jail on

August 18th, 1937, and that upon being questioned about making a statement, broke down and began crying and said "yes" (R. 123). Ranger Davenport stated that when he reached Beaumont between eleven and twelve o'clock, he found Sheriff Holliday there with Bob. That Ranger Williamson also was there, and that they saw Mr. Foreman talking to the prisoner, also Mr. Coker. He stated that when he left Beaumont jail, it was about three or three-thirty and Bob was still up then and that he had no idea when he was released from the men who were there interrogating him (R. 126-127). Williamson also testified that he left Bob White in the Beaumont jail around about 3:30 that morning (R. 126).

Bob White testified that he was taken to Beaumont while handcuffed and when it came time to take the handcuffs off the Ranger had lost the key to the handcuffs in the woods, and Mr. Willie was phoned to bring a key to get them off (R. 90-91). He also testified that he did not know what day of the week he was carried to Beaumont nor what day of the week he was brought back (R. 91). He also stated that the three officers he had identified (Williamson, Davenport and Weeks) carried shot guns and rifles with them on all the occasions, and that these three went with him to Beaumont (R. 93). This testimony was not denied by Mr. Weeks (R. 128). He testified that "I was in fear of my life or serious bodily injury," that he had recently been injured, at Beaumont. "I was in fear of my life or serious bodily injury when the case was tried before" (R. 115).

b.

This Court has correctly determined that the petitioner's motion for rehearing and petition for writ of certiorari and the record discloses that the use of the confession extorted by violence, torture, personal abuse, duress and threats of death from the petitioner by the agents and

officers of the State of Texas, while acting in their official capacities, in the proceedings of the Trial Court which ended in the conviction and sentence of death upon the petitioner, is a denial of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(1) The claim of constitutional rights was duly and seasonably asserted in the Trial Court below when the State sought the permission of the said court to put the alleged confession of Bob White in evidence, at which time the petitioner duly objected, asserting in substance:

> That the confession was made under duress, and was obtained by coercion, cruelty, and threats of death by State officers; that it was not free and voluntary and was obtained while the defendant was under illegal restraint and after a week of physical and mental coercion; that at the time he was suffering from assaults previously made and for at least a week immediately prior thereto made by officers in the woods, where defendant was carried so many times that the officers had lost tract of the same, all for the purpose of making the defendant confess; that he was not permitted to have access to or consult counsel in his behalf, and finally that this defendant was denied every right that he was entitled to under the Constitution of Texas and the Constitution of the United States (R. 29-32).

These objections and others made thereto were duly considered by the Trial Court, and were duly overruled, the petitioner reserved his exceptions in Bill of Exception No. 3, which appears in the record on pages 29 to 32. By this action the Trial Court permitted the State to put the alleged confession into evidence, which was duly considered by the jury. [For Texas practice, see Code of Criminal Procedure of Texas (1925), Art. 667.] The Trial Court again passed upon the claim of violation of the Federal rights of the petitioner here urged in the ruling denying a

new trial after the conviction of the petitioner, on the Amended Motion for New Trial (R. 17) by its order overruling same (R. 25).

(2) The Federal questions thus properly and timely asserted in the Trial Court and there properly reserved were again submitted to the Court of Criminal Appeals of the State of Texas, the highest court in criminal cases of this kind in which an opinion can be had, which that court duly considered and ruled adversely against this petitioner, as will more fully appear from the opinion of the court (R. 132). The same now appears reported in 128 S. W. (2d) 51, *et seq.* This judgment became final as to the State courts when the petitioner's motion for rehearing was denied (R. 141). The judgment of the Court of Criminal Appeals on the Federal questions there urged and determined adversely were held by this Court to be in conflict with the applicable decisions of this Court on the same questions urged in *Chambers* v. *Florida*, No. 195, decided February 12, 1940, and *Canty* v. *Alabama*, No. 634, decided March 11, 1940, and on the basis of these decisions granted petitioner's petition for writ of certiorari and reversed the judgment of the Court of Criminal Appeals.

ARGUMENT.

The conviction and sentence of death of the petitioner in the State Court in which the use of the confession of the petitioner, by the State in its proceedings, which was obtained by the State by compulsion, constitutes a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The State of Texas in its Petition for Rehearing by its counsel recognizes and construes the order and citations of this Court of March 25, 1940 as sustaining the peti-

tioner's contention that the confession so introduced and used against him was obtained in violation of, and constituted a denial of, due process under the Fourteenth Amendment to the Constitution of the United States (*id.* p. 4). Petitioner thinks that is a fair deduction of the Court's action, and he further urges that the record in this cause clearly supports the decision rendered by this Court.

However, the respondent contends that the record in this case raises the following questions and issues which this Court has granted permission to be heard, to wit:

First: Whether the record reflects that the decision of, and disposition made of this cause by, the Court of Criminal Appeals of Texas was based or founded upon any substantial Federal question as distinguished from an adequate State question. (4) e.

Secondly: Whether the record reflects that in the Court of Criminal Appeals of Texas, in the submission and determination of this cause, there was drawn in question the validity of a statute of the State of Texas as being repugnant to the Constitution or Laws of the United States, and the decision of that court was in favor of the validity of the statute. (4) f.

Thirdly: Whether the record sustains, as a matter of fact, the conclusion of this Court that the petitioner's confession was obtained in violation of any provision of the Constitution or Laws of the United States. (4) g.

Fourthly: Whether the record reflects facts which bring this case within the rule announced by this Court in the case of Chambers *v.* Florida, 195, decided Februare 12, 1940. (4) h.

Fifthly: Whether a confession made in conformity with the laws and applicable statutes of the State of Texas, governing the making and taking of confessions, and thereafter used by the prosecution upon the trial

of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or any other provision thereof. (4) j. (See Respondent's Petition for Rehearing, pp. 6-8.)

First, the petitioner contends that the record sustains, as a matter of fact, the conclusion of this Court that the petitioner's confession was obtained in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, and the facts of this case are within the rule announced in *Chambers* v. *Florida*, 195, *supra*.

The State's evidence clearly shows through its own witnesses that the confession was illegally obtained and improperly introduced as evidence against the petitioner. Mrs. Ruby Cochran testified that the assault took place at home, out in the country, west of Livingston on the night of August 10th, 1937, which was sometime after she had retired that Tuesday night (R. 71-77). Bob White was taken into custody according to R. D. Holliday, sheriff, on the morning after the alleged assault, August 11th, 1937, which was about nine or ten o'clock that morning (R. 53) at which time he arrested him, and that during this time he made about fifteen or sixteen arrests of Negroes (R. 54) and he charged all of them with the same offense he charged Bob White, but "I did not file a complaint against any of them," (R. 58). He also stated that he held the petitioner six or seven days before he was taken to Beaumont. H. R. Appling, Ernest Coker, "Zimmie" Foreman, private prosecutor aiding the State, Herman Crocker, all (R. 33-124) testified that each of them saw Bob White in Beaumont jail on the night of August 18, 1937, where they had gone to get the confession introduced by the State (R. 35) from Bob White, which bears

the date of August 19th A. D. 1937 (R. 35). Holliday also testified that while he held Bob White in the jail there at Livingston, he separated him from the others so that he could better observe and talk to him, and that he kept "watching and talking to him" (R. 54). Ranger Williamson testified that he took Bob White out of the jail and out on the road and then he "drive" off the road so many times that he could not remember the number. That he did this in order to talk to him alone as the jail was so crowded he could not talk him there (R. 125-126); but the testimony of Sheriff Holliday shows that he kept Bob White alone in the jail and watched and kept talking to him (R. 54). Ranger Davenport did not deny taking Bob White out of jail into the woods, giving as his only reason that it was necessary in order to talk to him (R. 126-127). Coleman Weeks, a peace officer, admitted that he was with the Rangers nearly every time they took Bob White out of the jail, but he did not know how many times (R. 128).

Williamson, Davenport and Weeks, were the officers identified by Bob White as the persons who had removed him from the Livingston jail, at night during the time he was confined there and "they would take him the woods somewhere" he did not know, and this occurred Thursday night after the day he was arrested, and several nights in a row (R. 89); and each time they would whip him with what he supposed to be a piece of hose made of rubber, and every time he was carried back he was admonished not to talk about it nor tell what they had been doing to him. He also testified that they would talk to him out in the woods, and he was kept handcuffed all during the times he was out (R. 88-90). Bob White testified that he could not read or write as he went to school "mighty little", nor could he sign his own name. He also stated that these officers who carried him out were always heavily armed (R. 93).

It appears from the record that after this ordeal in Livingston was over, Bob was carried to Beaumont on the night of the 18th of August, 1937, as Foreman the private prosecutor aiding the State testified that he knew that Bob was being carried to Beaumont jail to get the confession, also Holliday, and the Rangers and others knew it. He also stated that he left Livingstone about 12 o'clock the night of the 18th of August and arrived in Beaumont about two or three a. m. and that he found Bob White, dressed and up, there with Holliday, Roy Young (who did not testify), Ranger Jameson (who did not testify), Rangers Davenport, Williamson, Coleman Weeks, Ernest Coker, County Attorney of Polk County, and others (R. 115-119). This witness stated that after they obtained the "statement" from Bob they waited up around there, waiting to go "get somebody down there that was not involved in it and that knew nothing about it to witness the statement," and in the meantime he went out to get some coffee a time or two (R. 120). Weeks for the State stated that when he got to Beaumont that night about eleven or twelve o'clock, Holliday was already there, and that Mr. Coker and Mr. Foreman were talking to the petitioner, that he imagined he left Beaumont that morning about three-thirty, and at that time Bob was still up, and that he had no idea when he was released from the men interrogating him (R. 127). Ranger Williamson also stated that when he reached Beaumont he found Holliday there and that he and Davenport went there together and he left around 3:30 that morning, which he stated was before the "statement" was written. That during the time he was there he and other Rangers walked in and out while Bob was being questioned (R. 124-126). Davenport was practically to same effect (R. 126-128). Bob White testified that he did not tell Mr. Coker what to write in that statement at Beau-

mont, that he was in fear of his life or serious bodily injury. "I had recently been injured, at Beaumont. I was in fear of my life or serious bodily injury when the case was tried before (R. 115). He stated that while he was in Beaumont one of the Rangers kicked him as he fell asleep, compelling him to stay awake (R. 96).

Mr. Zimmie Foreman admitted on cross-examination that at the trial in Livingston Bob White testified that "the Rangers told me that everybody in the bottom laid it on me; and that I might as well own up to it; and that if I didn't own up to it they would kill me". Also he admitted the same witness there testified that "I have some signs on my arms yet from that whipping." "I will pull up my sleeves and show you". (R. 121.)

Herman Crocker for the State testified that after he got to the Beaumont jail on the eighth floor where Bob White was, at the time Mr. Coker started typing the statement, he saw Bob with tears falling down his cheeks, and he was asked three or four times before they started typing. (R. 123-124.)

At the first trial which occurred in Livingston County, before the same judge who tried the case in Montgomery County, the Court of Criminal Appeals in reversing the judgment, where it was shown that one of the prosecuting attorneys in his argument to jury to convict Bob White stated:

> "Look at this court room; it is crowded with Polk County people demanding the death penalty for Bob White."

The court in passing on this statement, held that the argument was undoubtedly prejudicial in its nature, and stated that the law in situations like the present one was aptly stated in the case of *Gazley* v. *State*, 17 Tex. App. 267, where it was said:

"In cases like this, in which there is always excitement and feeling in the minds of the community where it occurs, and where the trial of the accused party takes place, as in this case it did, soon after the supposed crime, it requires but a trivial matter indeed to prejudice the case of the accused. This fact is well known to all who have had experience in criminal trials."

White v. *State*, 117, S. W. 2d. 450, 452, 453.

The indictment was not obtained until after the State had secured the alleged confession from Bob White in Beaumont on August 19, 1937 (R. 35). The date of the indictment being August 23, 1937. (R. 1-2.) The State's evidence shows that the petitioner was held in illegal custody from August 11, to August 23, 1937, a period of eleven days or more.

Petitioner therefore concludes that the record sustains this Court in holding that the confession was obtained in violation of the due process of law in the Fourteenth Amendment to the Constitution of the United States, and the record reflects facts which bring this case within the rule announced by this Court in *Chambers* v. *Florida, supra.*

2.

Secondly, the petitioner contends that the record shows the decision and disposition of this cause by the Court of Criminal Appeals of Texas was based upon or founded upon a substantial Federal question as distinguished from an adequate State question.

The record in this case shows that at the time the State offered in evidence the purported statement of Bob White (R. 29-32) the counsel for him in the trial court before Judge Browder objected to its admission on thirteen grounds in which were raised grave constitutional questions tending to show that the alleged statement was not volun-

tary, was obtained by duress, torture and brutality of the State officers, and while the petitioner was held in illegal custody and in violation of every right he was entitled to under the Constitution of Texas and the Constitution of the United States. These contentions were overruled by the trial court, and the alleged statement or confession was admitted in evidence and read to the jury. The evidence supporting the contentions of the petitioner, and that offered by the State was submitted to the jury, and they were left to determine whether the purported confession was obtained by illegal or improper means prescribed by the Federal Constitution, under instructions of the trial court. (R. 13). The jury duly considered this and rendered the verdict finding the petitioner guilty as charged in the indictment and assessed his penalty at death (R. 17). This verdict was approved by the trial court and judgment in accordance therewith was rendered by the court. (R. 16.)

The petitioner alleged the admission of and consideration by jury of the alleged confession was error and again alleged the grounds set forth in his objections tendered at the time the State sought to put the matter in evidence (R. 29-32) which raised grave questions under the Federal Constitution. (R. 17.) The motion for the new trial was overruled, and on appeal the Court of Criminal Appeals affirmed the judgment of the trial court, after duly considering all of the issues raised in the trial court as shown by the petitioner's bill of exceptions and the entire evidence on the matter tendered in the lower court (R. 135). This judgment became final on the overruling of the petitioner's motion for rehearing (R. 141).

The judgment of the Criminal Court of Appeals on the grave Federal questions of violation of constitutional rights of the petitioner, were found to be at variance to the applicable decisions of this Court, and on this ground the writ

was granted and the judgment reversed, this Court citing, *Chambers* v. *Florida, supra,* and *Canty* v. *Alabama, supra.* Other decisions in support thereof are:

Brown v. *Mississippi,* 297 U. S. 278,
Moore v. *Dempsey,* 261 U. S. 86.
Abston v. *State,* 102 S. W. 2d. 428 (Texas),
Blackshear v. *State,* 95 S. W. 2d. 960 (Texas),
State v. *Miller,* 61 Wash. 125, 111 P. 1053.
Rounds v. *State,* (Tenn.) 106 S. W. 2d. 212.

3.

Thirdly, the Respondent contends or raises the question in its Petition for Rehearing, paragraph 4, section f, whether the record reflects that in the Court of Criminal Appeals in the submission and determination of this cause, there was drawn in question the validity of a state statute of Texas as being repugnant to the Constitution or Laws of the United States, and the decision of that court was in favor of the validity of the statute.

This contention only goes to the method by which the alleged violation of due process of law under the Federal Constitution was raised in the State courts. The record before this Court answers that query of the State, as the petitioner contended below that the use of the purported confession in the criminal trial proceedings not only violated the Federal Constitution but also the applicable provisions of the Constitution of Texas, (R. 30) and the decision of the Court of Criminal Appeals (R. 141) was reached without the necessity of quoting any Texas State statutes or constitutional provisions of the Texas and construing the same. Neither was any statute of Texas there challenged as being contrary to the Federal Constitution.

Chambers v. *Florida*, No. 195, decided Feb. 12, 1940;
Blackshear v. *State* (Texas), 95 S. W. 2d. 960;
Rounds v. *State* (Tenn.), 106 S. W. 2d. 212.

4.

Fourthly, the respondent contends or raises the question in its petition for rehearing, 4. j., whether a confession made in conformity with the laws and applicable statutes of Texas governing the making and taking of confessions, and thereafter used by the State upon the trial of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The respondent in the phrasing of this question assumes the alleged confession was made in conformity with the applicable laws and statutes of Texas, and then on that assumption seeks to raise the question of due process of law under the Federal Constitution, particularly the Fourteenth Amendment.

The petitioner contends that the record shows the alleged confession used by the State at the trial, over his objections timely and properly made raising grave questions of due process of law under the Federal Constitution, violated not only the applicable provisions of the Federal Constitution but also the applicable State statutes and laws governing the taking and making of confessions in criminal cases.

The applicable statutes governing a case of this kind are set forth and properly applied by the Court of Criminal Appeals of Texas, in *Abston* v. *State*, 102 S. W. 2d. 428, decided January 27, 1937, with rehearing denied March 17, 1937.

Petitioner contends in the present case the Court of Criminal Appeals of Texas, in disposing of the case on this issue

did so without construing or setting forth any applicable statutes, by holding, in effect, that not only the alleged confession, as duly challenged, did not violate any statutes of Texas or the Constitution of Texas, but did not violate the due process clause of the Fourteenth Amendment to the Federal Constitution, which holding on the Federal question was found by this Court to be directly in conflict with the applicable provisions of Federal Constitution and this Court's decisions construing the same, as declared by this Court in *Chambers* v. *Florida*, 195, *supra*, and *Canty* v. *Alabama*, No. 654, *supra*. Compare also, *Blackshear* v. *State* (Texas), 95 S. W. 2d. 960.

Conclusion.

The petitioner submits that the Court has correctly determined the Constitutional questions raised by the record and proceedings in this Court and declared on March 25, 1940, by granting all the relief this petitioner asked for, and issuing the writ of certiorari to the Court of Criminal Appeals, reversing the judgment of that court, and that this Court should not reverse the decision rendered on March 25, 1940, and should refuse the petition for rehearing filed by the State herein.

The equal protection and due process of law under the Constitution are the Magna Carta of individual freedom from oppressive procedures used by those acting under State power, and approval, who misuse these powers and privileges to abuse the weak. Force, injustice and cruelty should not be the instruments of those in authority charged with the enforcement of the criminal law, and by such illegal means condemn the accused and take his liberty and life away from him, as was done in those times in human history, when malice, witchcraft and superstition darkened the minds of men. This Court is the last resort of the poor

and weak, where refuge may be found beneath the shield of this Constitution, and find protection from those who seek to take life without due process of law.

Respectfully submitted,

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